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No. 90-1800

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY OF GRUMMAN AEROSPACE CORPORATION TO BRIEF IN OPPOSITION

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Petitioner Grumman Aerospace Corporation respectfully files this Reply to the United States' Brief in Opposition.

I. No Deference Is Due to OFPP Under *Chevron*.

The Government does not contest the fact that the Office of Federal Procurement Policy (OFPP) does not administer the Contract Disputes Act. Indeed, the Government's argument that OFPP had statutory authority to issue the claim certification regulation at issue in this case relies primarily on a different stat-

ute, the OFPP Act, 41 U.S.C. §§ 401-20. The Government concedes that the Contract Disputes Act expressly grants OFPP only limited authority to issue guidelines—not binding regulations—in the circumscribed area of agency board establishment, functions, and procedures. Opp. 8-9.

The OFPP Act, of course, authorizes only promulgation of *procurement* regulations, not regulations affecting *contract disputes*. So it is doubtful whether the OFPP Act could provide any authority to promulgate the contract disputes certification regulation. Furthermore, if the primary support for OFPP's certification regulation is to be found not in the Contract Disputes Act, but in the OFPP Act, then the Government's *jurisdictional* argument must fail. The panel below based its holding that the certification regulation has jurisdictional effect on the assumption that OFPP's authority derives from the Contract Disputes Act. But if OFPP's authority in fact derives from the OFPP Act, not the Contract Disputes Act, then the panel erred, and the regulation cannot have the jurisdictional effect the Government claims.

Finally, the Government's position begs the central question posed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The question *Chevron* poses—indeed, the threshold question whenever deference to agency interpretation of a statute is at issue—is whether Congress left any gap to fill. Here the words of Congress are plain and unambiguous ("the contractor shall certify . . . .").[1] Moreover, neither *Chevron* nor any of its progeny

[1] Ironically, it is the regulation, not the statute, that is ambiguous.

holds that an agency's interpretation of statutes it does not administer should be accorded deference. The Contract Disputes Act plainly does not grant OFPP authority to administer the Act. Thus, deference under *Chevron* simply does not apply in this case. *See Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring).

II. The Government Wrongly Asserts that the Jurisdictional Issue Has No Practical Consequence.

The Government (Opp. 10-11) mistakenly asserts that the panel's treatment of certification as a jurisdictional prerequisite does not alter the practical consequence for Petitioner. This is not the case. As Grumman has pointed out (Pet. 26-27), the Government's answer before the Armed Services Board of Contract Appeals admitted without qualification the jurisdiction of the Board under the Contract Disputes Act.[2] Unless proper certification is jurisdictional, submission of an improper certificate is a defect that can be waived or cured. The principles of waiver and cure obviate any need for Petitioner to begin anew by resubmitting its certified claim to the contracting officer.

An equally significant consequence of the panel's erroneous treatment of the certification requirement is the loss of five years' interest on Petitioner's claim. Pet. 11, n. 4. Finally, contrary to the Government's implicit assertion (Opp. 10 n. 8), statutes of limitation generally are not tolled by the filing of a complaint

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[2] Moreover, as noted in Grumman's Petition (Pet. 27 n. 10), the Government never moved the Board to dismiss for lack of jurisdiction.

where the court lacks jurisdiction over the subject matter.[3]

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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[3] The Government cites *Travelers Indemnity Co. v. United States*, 16 Cl. Ct. 142 (1988), for the proposition that the six-year limitations period contained in 28 U.S.C. § 2501 does not apply once the contractor elects to proceed under the Contract Disputes Act. The Government will undoubtedly contend, however, that a contractor that has filed a defective certification has *not* elected to proceed under the Act. Moreover, 10 U.S.C. § 2405(a) requires contractors to submit contract claims arising under shipbuilding contracts within eighteen months of accrual. The Government has interpreted this provision to require the submission of a "properly certified" claim in order to toll the limitations period. *See* Shipbuilders Council of America Brief *Amicus Curiae* In Support of Petitioner, 3.